UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FELTON A. SPEARS, JR., *et al.*,
Plaintiffs,

v.

FIRST AMERICAN EAPPRAISEIT, *et al.*,
Defendants,

Case No. 13-mc-52

Weber, J.
Litkovitz, M.J.

ORDER

This matter originated in the United Stated District Court for the Northern District of California. *See Spears v. First American eAppraiseIT*, No. 5:08-cv-868 (S.D. Cal.) (the underlying litigation). The underlying litigation is a class action against First American eAppraiseIT (EA) and Lender's Service, Inc. (LSI), wherein plaintiffs allege that defendants engaged in a scheme with Washington Mutual Bank (WaMu) to unlawfully inflate the values of properties for which plaintiffs and other similarly situated individuals sought loans in order to enhance WaMu's profits.[1] *See* Doc. 1, Ex. C, Second Amended Complaint. On August 26, 2013, plaintiffs issued a subpoena to non-party Cheryl A. Feltgen (Feltgen), WaMu's former Chief Risk Officer for the home loans division, seeking her deposition testimony. *See* Doc. 11, Ex. A, Subpoena; Doc. 10, Ex. 1, Attachment H at 24, 27, transcript of Feltgen's April 10, 2012 deposition testimony. This matter is before the Court on Feltgen's motion to quash plaintiffs' subpoena (Doc. 1); EA's and plaintiffs' respective responses in opposition (Docs. 10, 11); and Feltgen's consolidated reply memorandum (Doc. 12).

Feltgen moves to quash the subpoena for her deposition under Federal Rule of Civil Procedure 45 on the ground that it is unduly burdensome as it would require her to take time

[1]WaMu was initially named as a defendant in the underlying litigation but following its closure and entry into receivership, plaintiffs stipulated with WaMu's receiver and dismissed their claims against WaMu. *See* Doc. 10, Ex. 1, ¶ 2, Affidavit of Allison L. Libeu.

away from work. Feltgen also asserts the subpoena should be quashed as any potential testimony would be cumulative as she has previously testified on matters regarding her role as a WaMu executive and that counsel for plaintiffs is in possession of transcripts of her prior testimony. Alternatively, Feltgen seeks the entry of a protective order under Federal Rule of Civil Procedure 26 providing that the deposition be limited in scope to topics on which she has not already testified; be limited in duration to two hours; and that the parties be ordered to provide their questions to Feltgen in advance of the deposition. (Doc. 1). In support of the motion to quash, Feltgen submits her affidavit and the affidavit of her attorney, Hugh Handeyside, which includes several attachments: (1) a July 14, 2013, order from the Hamilton County, Ohio Court of Common Pleas granting in part and denying in part a similar motion to quash; (2) a copy of the subpoena; and (3) plaintiffs' second amended complaint in the underlying litigation. *See* Doc. 1, Exhs. 1, 2.

Both EA and plaintiffs oppose the motion to quash. EA contends that Feltgen's bald assertions of having to take time away from work are insufficient to meet her heavy burden of showing that plaintiffs' subpoena is unduly burdensome. EA further contends that Feltgen's prior deposition testimony is irrelevant because: (1) it is not admissible in the underlying litigation; and (2) it does not relate to Feltgen's involvement with EA, which is the testimony the parties seek to elicit. (Doc. 10). Plaintiffs similarly argue that: Feltgen's prior deposition testimony is inadmissible in the underlying litigation; the prior testimony does not relate to the specific issues in the underlying litigation; and the fact that she may be required to miss one day of work does not equate to undue burden. (Doc. 11). EA and plaintiffs thus assert that Feltgen's motion to quash should be denied.

In reply, Feltgen maintains that the discovery sought by the parties in the underlying litigation is cumulative as her prior testimony pertains to her previous employment with WaMu. Feltgen disputes EA and plaintiffs' assertion that this testimony is inadmissible, arguing that it may be admitted upon the parties' stipulation. Further, Feltgen maintains that her prior testimony is relevant to the underlying litigation as it relates to WaMu's policies and practices, including property appraisals, which form the bases of plaintiffs' claims. (Doc. 12). For the reasons that follow, Feltgen's motion to quash is denied.

"The scope of discovery is, of course, within the broad discretion of the trial court." *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 402 (6th Cir. 1998). A person served with a subpoena may object to it and move to quash it. Under Rule 45(d), courts "must quash or modify a subpoena that . . . subjects a person to undue burden." Fed. R. Civ. P. 45(d)(3)(A)(iv). "In evaluating a motion to quash, the court may consider 'whether (i) the subpoena was issued primarily for the purposes of harassment, (ii) there are other viable means to obtain the same evidence, and (iii) to what extent the information sought is relevant, nonprivileged, and crucial to the moving party's case.'" *Recycled Paper Greetings, Inc. v. Davis,* No. 1:08–mc–13, 2008 WL 440458, at *2 (N.D. Ohio Feb. 13, 2008) (quoting *Bogosian v. Woloohojian Realty Corp.*, 323 F.3d 55, 66 (1st Cir. 2003) (citing cases)).

Here, non-party Feltgen moves to quash the subpoena for her deposition testimony on the ground that it imposes an undue burden. Courts in this district "agree with the proposition that 'quashing a subpoena and the complete prohibition of a deposition are certainly extraordinary measures which should be resorted to only in rare occasions.'" *Williams v. Wellston City Sch. Dist.*, No. 2:09-cv-566, 2010 WL 4513818, at *3 (S.D. Ohio Nov. 2, 2010) (quoting *Alexander v. FBI*, 186 F.R.D. 60, 64 (D.D.C. 1998)). In determining whether a subpoena for a deposition

imposes an undue burden, the Court should balance the need and potential value of the information to the party seeking it against the expense and effort likely to be incurred by the producing person. *American Elec. Power Co., Inc. v. U.S.*, 191 F.R.D. 132, 136 (S.D. Ohio 1999). Further, the Court must weigh "the likely relevance of the requested material . . . against the burden . . . of producing [it]." *EEOC v. Ford Motor Credit Co.*, 26 F.3d 44, 47 (6th Cir. 1994). "[T]he status of a person as a non-party is a factor that weighs against disclosure[,]" and is relevant to the determination of whether a subpoena imposes undue burden. *Id. See also Williams v. Franklin Cty. Mun. Court*, No. 2:10-cv-01155, 2012 WL 748685, at *2 (S.D. Ohio Mar. 8, 2012). Yet, "[a] nonparty seeking to quash a subpoena bears the burden of demonstrating that the discovery sought should not be allowed." *Great Lakes Transp. Holding, LLC v. Yellow Cab Serv. Corp. of Florida, Inc.*, No. 11-50655, 2011 WL 2533653, at *1 (E.D. Mich. June 27, 2011) (citing 9A Wright & Miller, Federal Practice and Procedure § 2463.1). *See also Hendricks v. Total Quality Logistics, LLC*, 275 F.R.D. 251, 253 (S.D. Ohio 2011). "That person cannot rely on a mere assertion that compliance would be burdensome and onerous without showing the manner and extent of the burden and the injurious consequences of insisting upon compliance with the subpoena." 9A Wright & Miller, § 2463.1.

Further, Federal Rule of Civil Procedure 26 permits the Court to issue for good cause "an order to protect a party or person [from whom discovery is sought] from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1). Such protective orders may specify the terms of the discovery, including timing, and limit the scope of the discovery sought. Fed. R. Civ. P. 26(c)(1)(B), (D). Protective orders are appropriate if "the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other

source that is more convenient, less burdensome, or less expensive" or if "the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(2)(C)(i), (iii).

Here, Feltgen asserts the instant subpoena must be quashed because: (1) it is unduly burdensome insofar as appearing for the deposition will require her to take time off from work and (2) it seeks cumulative discovery given her prior deposition testimony which has been provided to plaintiffs' counsel. Feltgen supports her motion with her affidavit, wherein she attests that in 2012 and 2013 she testified as a non-party at depositions in three civil matters[2] regarding the scope of her responsibilities at WaMu, WaMu's appraisal practices and use of an outside firm to manage appraisals for home loans issued by WaMu, and the general practices at the WaMu home loan division. (Doc. 1, Ex. 1, ¶¶ 5-7, Feltgen Affidavit). Feltgen further attests that every time she is deposed, she must spend significant time preparing for the deposition and that "[a]ttending yet another deposition regarding subjects on which I have already testified would be time-consuming and burdensome for me and will require taking time off from my job." (*Id.*, ¶ 10). The Court will first address whether the information sought by the subpoena is cumulative.

At the outset, the undersigned finds that EA and plaintiffs' assertion that Feltgen's prior deposition testimony is inadmissible in the underlying litigation is not well-taken. Pursuant to Federal Rule of Evidence 804, Feltgen's prior testimony may be admissible in the underlying litigation upon a showing that the party it is offered against or its predecessor in interest had "an opportunity and similar motive to develop it by direct, cross-, or redirect examination." Fed. R. Evid. 804(b)(1). The Court is without sufficient information, *i.e.*, what party might use Feltgen's

[2]Feltgen's prior testimony was as follows: (1) she testified for seven hours as a non-party witness in *In re Washington Mutual Mortgage Backed Securities Litigation*, No. C09-37-MJP (W.D. Wash); (2) she testified for three hours as a non-party witness in *Dexia, SA/NV, et al. v. Bear Stearns & Co., Inc., et al.*, No. C12-4761 (S.D.N.Y.); and (3) she testified for two hours as a non-party witness in *Federal Home Bank of Chicago v. Banc of America Securities LLC, et al.*, No. 10-2-36526-5 SEA (King Cty. Super. Ct.). *See* Doc. 1, Ex. 1, ¶¶ 5-7.

prior testimony and for what purpose, to determine at this juncture whether the testimony would be admissible as a hearsay exception under Rule 804(b)(1).[3] Moreover, whether Feltgen's prior deposition testimony will be admissible in the underlying litigation is an issue properly reserved to the California trial court. Suffice it to say, EA and plaintiffs' argument that the prior testimony is inadmissible in the underlying litigation does not justify denying the instant motion to quash given Rule 804's exception permitting admission of prior sworn testimony. Accordingly, all that remains to be determined is whether the prior testimony is cumulative or duplicative such that Feltgen should be excused from complying with plaintiffs' subpoena.

Feltgen argues that her prior testimony covers the subjects at issue in the underlying litigation. Referencing plaintiffs' second amended complaint, Feltgen contends that she has previously testified about issues referenced in the pleading, such as WaMu's practices regarding outsourcing appraisal services. Given that the prior testimony covers topics referenced in plaintiffs' second amended complaint, Feltgen asserts that further testimony would be cumulative and that the marginal utility of the discovery to the parties is outweighed by the burden of requiring her to attend another deposition. (Doc. 1 at 8).

Both EA and plaintiffs maintain that while Feltgen's prior testimony covered some of the same ground, the allegations in the underlying litigation require discovery of information not previously addressed. Notably, the parties identify that Feltgen, as Chief Risk Officer of WaMu in 2006, was responsible for spearheading the transition from an in-house appraisal operation to an outsourced appraisal operation, including outsourcing to EA. To demonstrate Feltgen's direct involvement in this transition, EA has submitted evidence, including a February 24, 2007 email

[3]Nor is the Court capable at this time of determining whether the prior deposition testimony involved parties that qualify as "predecessors in interest" to either EA or plaintiffs. *See Clay v. Johns-Manville Sales Corp.*, 772 F.2d 1289, 1295 (6th Cir. 1983) ("[T]he previous party having like motive to develop the testimony about the same material facts is, in the final analysis, a predecessor in interest to the present party.").

from Feltgen discussing WaMu's development of a preferred appraiser list. *See* Doc. 10, Ex. 1, Tab 1, Affidavit of Allison L. Libeu, counsel for EA; Libeu Affidavit, Ex. F, February 24, 2007 email. Given plaintiffs' allegations that WaMu's appraiser list and its relationship with EA was unlawful, EA contends that Feltgen's testimony regarding her involvement with the outsourcing program and her knowledge of EA and its relationship with WaMu, is highly relevant to plaintiffs' claims and EA's defense thereof. EA asserts the motion to quash should be denied as Feltgen's prior testimony does not relate specifically to EA and, consequently, the discovery sought is not duplicative or cumulative. Plaintiffs' opposition underscores that "there is zero testimony [in the prior deposition transcripts on] the relationship between EA and WaMu." (Doc. 11 at 5).

The Court finds that the testimony sought by plaintiffs and EA is highly relevant to the parties' claims and defenses in the underlying litigation. Feltgen has failed to contradict the parties' supported arguments that her prior testimony does not relate to her role in WaMu's appraisal outsourcing program or her knowledge of WaMu's relationship with EA. As the information the parties seek to elicit at Feltgen's deposition is not present in the prior testimony, the discovery sought is not duplicative or cumulative and should be permitted unless the Court finds that Feltgen has met her heavy burden of establishing that it would be unduly burdensome.

Feltgen has not established that the subpoena presents an undue burden. The undersigned is cognizant that taking time from work to sit for a deposition is inherently burdensome, but Feltgen's mere assertion of burden does not suffice to establish that it is "undue." Her conclusory statement that attending the deposition "would be time-consuming and burdensome" is insufficient to show that the burden to Feltgen outweighs the probable relevance of her testimony or its potential value to the parties. *See Ford Motor Credit Co.*, 26 F.3d at 47.

Without a more particularized showing of specific harm that will result should Feltgen be required to testify, the mere fact that she may have to take time off from work is not enough to warrant the "extraordinary measure" of quashing the subpoena for her deposition. *See Zino v. Whirlpool Corp.*, No. 5:11-cv-1676, 2012 WL 5197377, at *1-2 (N.D. Ohio Oct. 19, 2012) (citing cases) (denying motion to quash subpoena for deposition and noting that prohibiting a deposition is erroneous absent extraordinary circumstances). As Feltgen has failed to provide the Court with particularized evidence establishing undue burden or other extraordinary circumstances that would warrant quashing plaintiffs' subpoena for her deposition testimony, the motion to quash (Doc. 1) is **DENIED**.

IT IS SO ORDERED.

Date: 3/14/14

Karen L. Litkovitz
United States Magistrate Judge